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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

217

No. 217

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

ALEXANDER LAWRENCE ALPERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Of Counsel.

Page

E. By its enumeration of particular articles of obscene matter belonging to a single class, Congress evinced an intention of limiting the application of the statute and of the general words employed therein 2

III. The rule of *ejusdem generis* is particularly applicable to the statute involved and under this rule the general words "other matter of indecent character" cannot be construed to extend to phonograph records 13

A. The rule generally stated 13

B. The rule of *ejusdem generis* is particularly applicable to the statute involved 13

C. In applying the rule of *ejusdem generis* the general words of the statute must be limited to matters of the same class or species as that to which the items in the specific enumeration belong 15

D. The general words "other matter of indecent character" cannot be construed to include phonograph records 16

IV. If the shipment in interstate commerce of obscene phonograph records is to be prohibited, it should be accomplished by amendment of the statute and not by the strained construction of the Court 17

Cases:

Barr v. *United States*, 324 U. S. 83 19

Boston Sand and G. Co. v. *United States*, 278 U. S. 41 3

Browder v. *United States*, 312 U. S. 335 4, 18

Chichester Chemical Co. v. *United States*, 49 F. 2d 516 16

Creek County v. *Seber*, 318 U. S. 705 9

Erwin v. *City of New Jersey*, 37 Atl. 732 16

	Page
Ex Parte Neet, 157 Mo. 527, 575 S. W. 1025	16
Ex Parte Roguemore, 60 Tex. CR, 282, 131 S. W. 1101	3
Ex Parte Webb, 225 U. S. 663	5
Fasulo v. *United States*, 272 U. S. 620	4, 5
First National Bank of Anamoose v. *United States*, 206 Fed. 374	13
Hansen v. *Hoff*, 291 U. S. 559	15
Harrison v. *Northern Trust Co.*, 317 U. S. 476	3
Harrison v. *Vore*, 50 U. S. 372	5
Helvering v. *Stockholm Enskiloa Bank*, 293 U. S. 84	14
Holy Trinity Church v. *United States*, 13 U. S. 457	10
In Re Barre Water Co., 62 Vt. 27	16
In Re Bush Terminal, 95 F. 2d 659	13, 16
Jerome v. *United States*, 318 U. S. 101	4
Lyman v. *C.I.R.*, 83 F. 2d 811	16
McBoyle v. *United States*, 283 U. S. 25	15, 18
Parkman v. *Lemmen*, 119 Kan. 323	16
People v. *McKean*, 76 Cal. App. 114	16
Prussian v. *United States*, 282 U. S. 675	4
Resnick v. *Boyd*, 99 Pa. 555	16
Rhone v. *Loomis*, 79 Minn. 200, 77 N. W. 1025	16
State of Missouri v. *Wilson*, 166 S. W. 2d 499	16
Vermilya-Brown Co. v. *Connell*, 335 U. S. 377	19
Vierek v. *United States*, 318 U. S. 101	5
United States v. *American Trucking Ass'n*, 317 U. S. 476	3
United States v. *Chase*, 135 U. S. 255	5, 7, 9, 15
United States v. *Commeford*, 25 F. 902	7
United States v. *Dickerson*, 310 U. S. 554	3
United States v. *Fruit Growers Express Co.*, 279 U. S. 363	4
United States v. *Gaskin*, 320 U. S. 527	5
United States v. *Huggett*, 40 F. 636	7
United States v. *Katz*, 271 U. S. 354	10
United States v. *Loftis*, 12 F. 671	7
United States v. *Mathias*, 36 F. 892	7
United States v. *Phez Co.*, 28 F. 2d 106	15
United States v. *Reese*, 92 U. S. 214	4

Page

United States v. *Resnick*, 299 U. S. 207 4
United States v. *Salem*, 235 U. S. 237 13
United States v. *Sheldon*, 15 U. S. 119 4
United States v. *Weitzel*, 246 U. S. 533 4, 5
United States v. *Wiltberger*, 18 U. S. 76 5, 15

United States Statutes:

Act of August 30, 1842, 5 Stat. 566 6
Act of March 2, 1857, 11 Stat. 168 6
Act of March 3, 1865, 13 Stat. 507 6
Act of June 8, 1872, 17 Stat. 302 6
Act of March 3, 1873, 17 Stat. 599 6
Act of July 12, 1876, 19 Stat. 90 7
Act of June 18, 1888, 25 Stat. 187 7
Act of Sept. 26, 1888, 25 Stat. 496 7
Act of Feb. 8, 1897, 29 Stat. 512 7
Act of March 4, 1911, 36 Stat. 1339 11
Act of June 5, 1920, 41 Stat. 1060 8
Criminal Code, Sec. 245, 18 U. S. C. (1946 ed.) 396, now 18 U. S. C. (1948 rev.) 1462 8
Criminal Code, Sec. 211, 18 U. S. C. (1946 ed.) 334, now 18 U. S. C. (1948 rev.) 1461 11

Miscellaneous:

59 Cong. Rec. 2170, 7297 22
H. Rep. No. 580, 66th Cong. 2nd Session 59
S. Rep. No. 528, 66th Cong. 2nd Session 59

Sutherland: *Statutory Construction*, 3d ed. 1943:

Sec. 4502 3
Sec. 4802 10
Sec. 5102 18
Sec. 5605 5

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BRIEF FOR THE RESPONDENT

General Statement

Respondent concurs in the general statements of the Solicitor General in regard to the opinion below, jurisdiction, question presented and statute involved.

Summary of Argument

The burden rests upon the government to establish that the acts of respondent constitute a crime against the United States. It is not enough that the government show that the

INDEX

	Page
General statement	1
Summary of argument	1
Argument:	
I. The Court should make use of all available aids to statutory construction in determining the meaning and intendment of the statute	3
II. All pertinent principles of and applicable aids to statutory construction demonstrate that the words "other matter of indecent character" as employed in Criminal Code Sec. 245, 18 U.S.C. (1946 ed.) 396, are not all-inclusive in operation and effect	4
A. Penal statutes are to be strictly construed and all reasonable doubt concerning their meaning should be resolved in favor of the accused	4
B. The historical background of the legislation demonstates that the statute involved is limited in operation and effect and that the general words are not to be construed as being all-inclusive	6
C. By its amendment of the statute in 1920, Congress again demonstrated that the act was not all inclusive and that the general words employed therein were limited in operation and effect	8
D. The title given to the section involved, "importing and transporting obscene books," indicates that the statute is not all-inclusive and does not cover every type of obscene matter.	10

accused was guilty of reprehensible conduct. It is not enough that the government demonstrate that such acts *ought* to be a crime. The government must prove that the acts complained of *actually are* a crime.

The position of the government appears to be that, by using the general words "other matter of indecent character" after the specific enumeration, Congress evinced an intention that the act should be construed as being all-inclusive in nature. Based upon this assumption of Congressional intent, the government maintains that the court below erred in applying the rule of *ejusdem generis* and the principle of strict construction to the statute involved. Apparently the government has abandoned any claim that the general words "other matter of indecent character" can be construed to include phonograph records in the event the statute is not all-inclusive in operation and effect.

This position is directly opposed to that maintained by the government in the court below, wherein it conceded that the statute should be strictly construed and the rule of *ejusdem generis* applied. (*Alpers* v. *United States*, 175 F. 2d 137, R. 15). It is based upon the erroneous supposition that words have meanings in and of themselves and upon the mistaken belief that there exists some rule of law which prohibits resort to aids to statutory construction when words appear to be clear on superficial examination. All of the aids to statutory construction, which the government seeks to ignore, clearly establish that the general words "other matter of indecent character" as used in Title 18, U. S. C. (1946 ed.) 396, should be restricted in operation and their meaning determined by the application of the *ejusdem generis* doctrine. The decision of the court below is a correct application of these principles and should be affirmed.

ARGUMENT

I

The Court Should Make Use of All Available Aids to Statutory Construction in Determining the Meaning and Intendment of the Statute.

The contention of the government that the general words of the statute are comprehensive enough to include phonograph records, and therefore the court need not seek other aids to determine the meaning and scope of the statute in question *assumes the very fact in issue.* It is based upon the premise that words have meaning in and of themselves regardless of the context of the statute in which they are used. It overlooks the fact that a mere finding that the meaning of the words is clear is, in itself, a form of statutory construction. Words are at best inexact tools and for that reason there is no rule of law which forbids resort to relevant aids to statutory construction no matter how clear the meaning of the words may appear on superficial examination. *Harrison* v. *Northern Trust Company,* 317 U. S. 476, 479; *United States* v. *American Trucking Ass'n,* 310 U. S. 534; *Boston Sand and G. Co.* v. *United States,* 278 U. S. 41, 48.

Statutory construction is a fact issue. All relevant evidence on this question of fact should therefore be considered by the court. Sutherland: Statutory Construction (3rd Ed. 1943) Vol. II, Sec. 4502. As this court stated in *United States* v. *Dickerson,* 310 U. S. 554, 561-2, "It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words . . . The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction." This is particularly true in the instant case, where Congress

can be presumed to have known that similar phrases employed in criminal statutes have often been restrictively construed by the courts.

The case of *Browder* v. *United States*, 312 U. S. 335, cited by the government is not properly applicable to the action at bar. The construction of the specific word "use" in accordance with its ordinary acceptation is not in any way similar to the construction of a phrase to which frequent limitations have attached under accepted rules of statutory construction.

II

All Pertinent Principles of and Applicable Aids to Statutory Construction Demonstrate That the Words "Other Matter of Indecent Character" as Employed in Criminal Code Sec. 245, 18 U. S. C. (1946 ed.) 396, Are Not All-Inclusive in Operation and Effect.

A. *Penal statutes are to be strictly construed and all reasonable doubt concerning their meaning should be resolved in favor of the accused.*

Penal statutes are to be strictly construed. The law zealously guards the rights of an individual no matter how much it may abhor his conduct. Under our system of law, whatever the conduct of an individual may be, however much this conduct may offend our sensibilities, the courts will not punish that conduct unless it has been specifically delineated as a crime within the meaning and intendment of the statutes.[1]

While it is true that strict construction does not require words to be so narrowly construed as to exclude cases that

[1] *United States* v. *Reese*, 92 U. S. 214; *Jerome* v. *United States*, 318 U. S. 101, 105, 643; *Fasulo* v. *United States*, 272 U. S. 620; *United States* v. *Sheldon*, 15 U. S. 119; *United States* v. *Weitzel*, 246 U. S. 533; *United States* v. *Fruit Growers Express Co.*, 279 U. S. 363; *Prussian* v. *United States*, 282 U. S. 675; *United States* v. *Resnick*, 299 U. S. 207.

are fairly within their meaning, courts may not extend the application of a statute by judicial construction because they believe that the legislature should have made the law more comprehensive. Nor may courts extend the application of a statute because it appears to them probable that the failure of the statute to define the particular act was due to defective draftsmanship, inadvertence or mistake. This is true even though the act complained of may involve the same mischief the statute was designed to suppress.[2]

The rule of strict construction is founded upon the principle that in dealing with criminal statutes, the penalties of which circumscribe personal freedom, all reasonable doubt as to the statutory proscription of the act should be resolved in favor of the accused. Just as an accused must be acquitted of a charge, unless there is proof beyond a reasonable doubt of his guilt upon the facts so should an accused be dismissed if any doubt exists as to whether or not the acts he has committed constitute a crime.[3] The unanimous decision of the Circuit Court of Appeals for the Ninth Circuit which determined that phonograph records where not within the purview of the statute, should be proof enough on its face, that more than a reasonable doubt exists as to whether or not the statute was designed to cover such records.

While this court may not approve of the conduct of respondent, and while it may regret that Congress has not enacted proper legislation to proscribe such conduct, it should not extend the application of the statute by judicial

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[2] *United States* v. *Wiltberger*, 18 U. S. 76; *United States* v. *Chase*, 135 U. S. 255; *Fasulo* v. *United States*, 272 U. S. 620; *United States* v. *Weitzel*, 246 U. S. 533; *Vierek* v. *United States*, 318 U. S. 101, 105.

[3] *Harrison* v. *Vore*, 50 U. S. 372, 378; *United States* v. *Gaskin*, 320 U. S. 527, 530; (Dissenting opinion of Justice Murphy); *Ex Parte Webb*, 225 U. S. 663; Sutherland: *Statutory Construction* (3rd. ed. 1943), Vol. III, Sec. 5605.

legislation because it feels the protection of the public is better served thereby. To do so is to sow seeds of oppression which may prove more harmful to society in the long run than have the acts of respondent in this specific instance.

B. *The historical background of the legislation demonstrates that the statute involved is limited in operation and effect and that the general words are not to be construed as being all-inclusive.*

The legislative history of the particular provision here concerned and of the statutes in *pari materia* therewith, demonstrate that Congress has not considered this section to be unrestricted in operation and effect. This history, which is one of amendment and of restrictive interpretation by the courts, clearly shows that Congress at all times must have been aware of the limited character of the legislation.

Probably the first legislation on the subject of obscene representations was enacted on August 30, 1842, 5 Stat. 566. This statute, which was concerned with importation from foreign countries alone, was confined solely to *pictorial* obscenity. The pertinent language of this section prohibited the importation of "indecent and obscene prints, paintings, lithographs, engravings and transparencies." This original statute was amended on March 2, 1857, 11 Stat. 168 and finally found its way into the mail statutes on March 3, 1865, 13 Stat. 507, where for the first time the word "book" made its appearance in the legislation. The mail statute was once amended in 1872, 17 Stat. 335 and became a part of the Comstock Act of 1873, 17 Stat. 599.

The Comstock Act, set forth in its pertinent provisions in the brief submitted by the government, showed a wide divergence of language between the first section regulat-

ing the sale, lending, giving away or publishing of obscene books and pictures and the section governing the mailing thereof. The position of the government that the "appearance of limited reach in that section is deceptive and is due to the use of language which, while narrower than that used in the preceding section, was nevertheless adequate to achieve the all inclusive purpose of the legislation" is untenable in the light of the court decisions and Congressional action which took place after the enactment of the Comstock Act and prior to the present legislation.

On July 12, 1876, Section 2 of the Comstock Act covering the mailing of obscene matter was amended by adding to the specific enumeration the word "writing". 19 Stat. 90. Again, on June 18, 1888 Congress saw fit to amend this section to cover obscene language on the envelope, outside cover or wrapper of mail matter. 25 Stat. 187. On September 26, 1888, the section was again amended to add the word "letter" thereto. 25 Stat. 496.

In 1890 the Supreme Court in the case of *United States* v. *Chase*, 135 U. S. 255, held that prior to the amendment of September 26, 1888, the mailing of an obscene letter was not covered by the statute. Other decisions of that period also indicated that the mail statute was not all-inclusive.[4]

It was on February 8, 1897 that the present act concerning shipment in interstate commerce was first enacted, 29 Stat. 512. The specific enumeration was taken from the Act of September 26, 1888, 25 Stat. 496. The only variation was the substitution of the word "matter" in lieu of the word "publication" then used in the mail statute. The government contends that the purpose of the substitution was that "many articles which the mails could not handle might be shipped in interstate commerce" and there-

[4] *United States* v. *Huggett*, 40 F. 636; *United States* v. *Mathias*, 36 F. 892; *United States* v. *Commerford*, 25 F. 902; *United States* v. *Loftis*, 12 F. 671.

fore Congress chose a broader term for the statute affecting the latter. The logic of this statement does not appear clear in view of the contention of the government that the mail statute, as it existed at the time of the Comstock Act, was all-inclusive in nature. This statement by the government further is mere conjecture. A more likely and more reasonable explanation is that the word "matter" was substituted because of the court decisions referred to above, which held, in effect, that for an article to come within the purview of the section it had to be not only of the same class as the specifically enumerated articles, but that it also had to be a publication.

On March 4, 1909 the section became a part of the Criminal Code, Section 245, 18 U. S. C. (1946 ed.) 396, and again the language was changed by the addition of the word "filthy" thereto. From all of this history it does not appear that Congress could possibly have considered the statute as all-inclusive at any particular stage of its development. The actions taken by that body and the decisions of the courts in connection with the similar companion acts belie any such assumption.

C. *By its amendment of the statute in 1920 Congress again demonstrated that the act was not all-inclusive in nature and that the general words employed therein were limited in operation and effect.*

On June 5, 1920 Congress again amended Section 245 of the Criminal Code, 18 U. S. C. (1946 ed.) 396, by adding the words "motion picture film" to the list of articles specifically prohibited by statute. In this connection the government states that any inference as to Congressional intent must necessarily be guesswork but that it is probable that the amendment was enacted out of an abundance of caution.

The reasoning of the government not only overlooks the past history of the statute, but it also ignores the rule of

statutory construction that penal statutes are not to be construed on the basis of mere probabilities. It is an established principle of statutory construction, that in the absence of a known explanation it must be presumed that when a statute is amended some change in the law was intended. *Creek County* v. *Seber*, 318 U. S. 705, 718. As the Court said in the case of *United States* v. *Chase*, 135 U. S. 255:

> "An amendment was passed on September 26, 1888. For the first time in the history of the postal service the word 'letter' was included in the list of articles nonmailable by reason of being Obscene. . . . If letters were embraced in the statute upon which the indictment is founded why did Congress consider it necessary to insert the specific word to designate them in 1888. It must be that that body did not put the construction on the prior statute claimed on behalf of the United States else we would have it doing a vain and useless act."

A presumption of law is the product of the experience of the courts. It is an empirical yardstick to be utilized in case of doubt and in preference to mere conjecture and surmise. What the government complains of as a mere assumption on the part of the court below that Congress "considered that motion picture film was not within the classification mentioned in the statute" was nothing more or less than the court's application of this reliable principle in place of pure guesswork.[5]

What change was made by Congress in 1920? It could only have been the adding of something to the statute that had not existed there before, the prohibition of something

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[5] The case of *Eureka Products* v. *Mulligan*, 108 F. 2d 760, cited by the Government is not in point. There is no indication that in any of the proceedings the question was raised as to whether or not the statute involved covered motion picture film. It appears that the only issue tried was whether or not the film concerned was obscene. In addition the statute involved had an apparent greater scope than the present statute with which we are concerned.

that had not been prohibited before. At the time the amendment was made the general words "other matter of indecent character" were an integral part of the statute. Were these words considered by Congress to be unrestricted in scope and application no amendment would have been made or required, because no amendment could have added anything to the statute.

Pertinent excerpts from the Congressional Record, which are set forth in the Appendix hereto, bear out the correctness of the determination of the trial court. This legislative history unmistakably shows that the statute was confined to "certain inhibited articles" and that the amendment was enacted for the purpose of "including obscene motion picture film." This amendment was designed to "add" something to the statute that had not been contained within its provisions theretofore. Not only does this legislative history establish that the statute was one of specific enumeration but it amounts to a declaration that the words "other matter of indecent character" were used only in a restricted and limited sense.

D. *The title given to the section involved, "Importing and Transporting Obscene Books," indicates that the statute is not all-inclusive and does not cover every type of obscene matter.*

While the title given to an act is not necessarily controlling, it may be looked to by the courts as an aid in interpreting and construing the statute and in determining the true intention of the legislature in its enactment. *Holy Trinity Church* v. *United States,* 13 U. S. 457; *United States* v. *Katz,* 271 U. S. 354; Sutherland: Statutory Construction (3rd ed. 1943) Sec. 4802.

The particular act in question is entitled "Importing and Transporting Obscene Books," a title which reveals that the act was specifically designed to restrict the transporta-

tion of obscene literature and that it was not intended to be all-inclusive in scope. This fact is underlined by an examination of the title of the companion mail statute which prohibits the transportation of obscene matter through the mails. These sections, as the legislative history has demonstrated, had the same roots and grew out of the same statutes. The mail statute, 18 U. S. C. 334 (1946 ed.) bears the title "Mailing Obscene Matter" a much more general title in keeping with the more comprehensive language used in that statute.

The Criminal Code of the United States has been recodified and revised. This monumental and exhaustive revision began in late 1943 and was completed in the summer of 1948. The legislative history of this recodification and revision reveals that every part of each statute was given consideration, sections were consolidated, verbose phrases were pruned, archaic expressions eliminated, statutes dealing with the same general subject matter were arranged in the same chapters, and titles of sections were changed or modified. The legislative history further shows that each section was reviewed and examined and re-reviewed and re-examined to the end that each would clearly and simply express its true nature and scope.

In the revised and recodified Title 18, former Sections 334 and 396 were placed one after the other in Chapter 71 and numbered 1461 and 1462 respectively. The language and scope of former section 334 had been broadened to include matter of "a character tending to incite arson, murder, or assassination" by amendment on March 4, 1911, 36 Stat. 1339. This change in language and expansion of purpose is reflected in the new title given to the act, "Mailing obscene and crime-inciting matter."

The entire language of former section 396 was revised. It should be noted that no expansion of purpose or increase of scope was made in the substantive portion of the legis-

lation, the revision being concerned with simplification of language alone. It is readily apparent that this latter section dealing with transportation in interstate commerce cannot be construed to cover all matters proscribed by the statute dealing with the mails. It certainly is undisputed that it cannot be held to cover matter of "a character tending to incite arson, murder, or assassination." The limited reach of this section was recognized by the title given to it, "Importation or transportation of obscene literature." It should be noted specifically that while revising the language and the title of this section, Congress did not choose to employ a title which would compare in generality with that of the mail statute. Had Congress intended this statute to have general application to all obscene matter it would have been a simple matter for it to have made the title read "Importation or transportation of obscene *matter.*" It did not do so. In view of the care, thought and study that went into this revision it logically appears that Congress did not intend this section to be all-inclusive in scope, but was only concerned with obscene literature, a word which, itself, defines the limits of the statute.

E. *By its enumeration of particular articles of obscene matter belonging to a single class, Congress evinced an intention of limiting the application of the statute and of the general words employed therein.*

Where a statute employs specific words enumerating specific classes, modes or species, the statute should be construed as being limited in operation and not all-inclusive in scope. This principle of limitation attaches to the general words as well as to the specific enumeration. It is based upon the sound reason that if the legislature had intended the statute to be unrestricted in scope and the general words to be universal in application, it would have

de no mention of special classes or things at all, but uld only have employed general words such as "all per- ns who" or "any obscene or indecent matter." It is upon s sound and logical basis that the rule of *ejusdem gen- is* was founded. In re *Bush Terminal* (CCA-2) 95 F. 2d 9.

III

e Rule of Ejusdem Generis Is Particularly Applicable to the Statute Involved and under This Rule the General Words "Other Matter of Indecent Character" Cannot Be Construed to Extend to Phonograph Records.

A. *The rule generally stated.*

The rule of *ejusdem generis* provides that where general rds follow the enumeration of particular classes or spe- ic things belonging to a particular class, the general rds are to be limited in their application to things of the me species or genus as those specifically enumerated. In actical application it simply means that where there is a ecific enumeration of persons or things of the same class species followed by a clause embracing "other" or ny" persons or things, the general words "other" or ny" are read as "other such like" or "any such like" d not as though they were unrestrictive in operation and fect.

B. *The rule ejusdem generis is particularly applicable the statute involved.*

The rule of *ejusdem generis* is particularly applicable penal statutes. *United States* v. *Salem*, 235 U. S. 237; *rst National Bank of Anamoose* v. *United States*, C. C. -8), 206 Fed. 374. While the government now main- ins that it was error for the court below to apply this le to the statute, it admitted that the rule was ap- icable when the matter was presented in that court.

United States v. *Alpers*, 175 Fed. 2d 137 (R. 15). In support of its present position as to the inapplicability of the statute the government cites the case of *Helvering* v. *Stockholm Enskilda Bank*, 293 U. S. 84. This case, which dealt with a tax statute and not with a criminal action, admitted that the "rule is a well established and useful one." The reason the court did not apply the rule in the *Stockholm Bank* case was because the legislative intent, as gained from a study of all other aids, indicated that the general language was not employed in a limited sense.

It is true that the rule of *ejusdem generis* may not always be applicable to statutes defining crimes. However, a review of the special circumstances under which the courts have held the rule inapplicable discloses that none of these circumstances exist in the present action. Firstly, the courts have held that the rule should not be applied where the clear intention of the legislature, as gained from all other available aids, is to make the statute all-inclusive. It is readily apparent that no such clear intention exists in this case. Secondly, the courts have denied the applicability of the rule in those cases where the articles in the specific enumeration had no common attribute to set them apart as belonging to any particular class or species. It is quite obvious that this exception does not apply in the instant case, where all the articles represent one prime class—visual representations. The courts, also, have restricted the application of the rule where the specific enumeration is sufficiently complete to exhaust the class to which the articles belong, thus leaving nothing for the general words to operate upon. In the present case the specific enumeration barely scratches the surface. Other visual representations which may be considered as covered by the general language of the statute under the doctrine of *ejusdem generis* are: Newspapers, magazines, periodicals, brochures, wood cuts, engravings, etchings, lithographs,

cartoons, posters, advertisements, circulars, limericks, poems, etcetera.

C. *In applying the rule of ejusdem generis the general words of the statute must be limited to matters of the same class or species as that to which the items in the specific enumeration belong.*

The position of the government that if the rule *ejusdem generis* is applicable, the genus to which the general words should apply is obscene matter is one that would render the rule nugatory. The general words would then become unrestricted in operation and the statute all-inclusive in scope. In applying the rule of *ejusdem generis* it is not enough that the matter involve the same mischief which the statute is designed to suppress, it must also be of the same class as the articles listed in the statute. Where the statute deals with specific things or particular modes then the general words must be limited to such things or modes. *U. S.* v. *Wiltberger*, 18 U. S. 76; *U. S.* v. *Chase*, 135 U. S. 255. The statute may not be extended to things of a different class or species even though it may appear to the court that the same policy applies thereto. As this Court stated in *McBoyle* v. *United States*, 283 U. S. 25, 27, "The statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely much broader words would have been used."

A survey of a few of the decided cases shows the correct application of this principle. This Court held in *Hansen* v. *Hoff*, 291 U. S. 559, that the phrase "any other immoral purpose" after the enumeration "Prostitution" did not include an immoral purpose short of concubinage. Unfermented loganberry juice was held in *United States* v. *Phez. Co.*, 28 F. 2d 106 not to be within the meaning of the phrase "and other soft drinks" after the enumeration "unfer-

mented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters or beverages." In *Lyman* v. *C. I. R.*, 83 F. 2d 811, crop shortage was held not within the meaning of the words "or other casualty" after the enumeration "fire, storms, shipwreck." In *Parkman* v. *Lemmen*, 119 Kan. 323 a shotgun was not included in the words "other dangerous weapon", as all the enumerated weapons were hand weapons.

The listing could be continued indefinitely. The principle would remain the same. It is not enough that the purpose be immoral, the weapon be dangerous, the drink be a soft drink, the loss be due to a casualty, it must also be that the act or article complained of be of the same class of immorality, dangerous weapons, soft drinks, or casualties, as those enumerated in the statute.

In Re: Bush Terminal, 93 F. 2d 659;
State of Missouri v. *Wilson*, 166 S. W. 2d 499;
In Re: Barre Water Co., 62 Vt. 27;
Resnick v. *Boyd*, 99 Pa. 555;
People v. *McKean*, 76 Cal. App. 114;
Rhone v. *Loomis*, 74 Minn. 200, 77 N. W. 1025;
Ex Parte Neet, 157 Mo. 527, 57 S. W. 1025;
Ex Parte Roquemore, 60 Tex. Cr. 282, 131 S. W. 1101;
Chicester Chemical Co. v. *United States*, 49 F. 2d 516;
Erwin v. *City of New Jersey*, 37 Atl. 732.

D. *The general words "other matter of indecent character" cannot be construed to include phonograph records.*

The reasoning of the Court below which the government condemns is sound. The court first found that the statute was not all-inclusive. It next found that all of the articles listed in the statute belonged to a single broad classification—visual representations. The court determined, however, that all visual representations were not *ejusdem generis* with the enumerated articles since all of the spe-

cifically named articles had one further characteristic in common which set them apart, they could all be read or observed without the aid of any mechanical contrivance. In view of this fact, they determined that the amendment of 1920 was proper and reasonable. What the government complains of as a resort to "pedantic erudition in Greek etymology" was not indulged in by the court to show that the statute covered only visual representations. This it had already established. The government had insisted that under the rule of *ejusdem generis* the general words of the statute covered phonograph records. It is true that most of its argument was concerned with the word "print". The purpose of the court, however, was to demonstrate not only that records could not be considered as belonging to a class defined by the word "print" but also to demonstrate that they could not belong to a class defined by the word "writing." This it did by showing that the word "writing" was used in a limited sense. It foresaw a possible contention that since the etymology of the word phonograph was tied in with the word writing an attempt might be made to include records under such a term. The purpose of its discussion was to dispel any such contention. Having determined that phonograph records were not within the meaning of the word writing, the court then went on to point out that Congress did not add phonograph records to the statute in 1920 because it was thinking solely in terms of visual representation.

IV

If the Shipment in Interstate Commerce of Obscene Phonograph Records Is to Be Prohibited, It Should Be Accomplished by Amendment of the Statute and Not By the Strained Construction of the Court.

The government has argued at some length that Congress should not be required to amend the statute whenever a

new method of communicating ideas is invented. In support of this position it has argued, further, that a statute necessarily embraces everything which may subsequently fall within its scope and therefore the Court should construe this particular statute as its judgment dictates Congress would have done if it had acted with the present situation in mind. This argument has two fatal flaws. Firstly, it assumes the very fact in issue—the all-inclusiveness of the statute. Secondly, it fails to recognize that Congress has acted with the present situation in mind and has failed to prescribe the shipment of obsence phonograph records in interstate commerce.

As a legal proposition, it is not disputed that a statute, general in application and universal in scope, may be construed to include new situations which fairly come within its orbit. This proposition is valid, however, only if the statute is all-inclusive. Whenever a statute is expressly made applicable to a particular situation, a specific thing, or to a particular class of a larger group, subsequent events will have no effect to enlarge the meaning of the statute. *McBoyle* v. *United States*, 283 U. S. 25, 27; Sutherland: Statutory Construction (3rd ed. 1943) Sec. 5102, Vol. III, p. 511. The statute with which we are dealing here is one that is limited in application to a particular class of a larger group. The argument made by the government is, therefore, not persuasive in the instant action. It should be noted that none of the cases cited by the government in support of this proposition were concerned with a statute which was limited in reach or to which the rule of *ejusdem generis* applied. With the exception of the case of *Browder* v. *United States*, 312 U. S. 335, none of these cases involved penal statutes. That case, as we have already seen, is not applicable to the case at bar.

Congress in dealing with this particular problem has been only concerned with literature and with other visual

representations. If obscene phonograph records constitute an unforseen problem then it is the type of problem referred to by Justice Frankfurter in his dissenting opinion in *Barr* v. *United States*, 324 U. S. 83, at page 100 wherein he stated: "In this case we have not an unforseen situation fitting into a general context. Here we have an unforseen problem with which Congress did not deal . . . If the problem itself was not in the contemplation of Congress, as this problem was not, how can it be said that Congress legislated against that problem?"

In construing this statute the Court may well assume that Congress had the present situation in mind.[6] In the first place, it must be remembered that prior to the enactment of the original legislation, the companion statutes had been subject to frequent amendment and restrictive interpretation. In between the time of the original enactment and the amendment of 1920, the phonograph increased greatly in popularity. At the time of the amendment of 1920 phonograph records were as capable of carrying obscene recordings as they are today. Yet, while Congress saw fit, at that time, to amend the statute by adding motion picture film, it did not seek to add phonograph records. When the tremendous work of revision and recodification took place during the years 1943-1948, there can be no doubt that phonograph records were already old means of communicating ideas. Certainly, the interstate traffic in these records was in existence during this period. Nevertheless, Congress in enacting the revised section, 18 U. S. C. 1462 did not add phonograph records to the list of prohibited articles nor did it give any indication that it considered them covered by this

[6] The case of *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, is therefore not in point, but it is interesting to note that this case, too, stands for the proposition that words have different shades of meaning, and that the meaning of the words as used in a particular statute is to be determined by considering all the circumstances under which the words were employed.

statute. As we have demonstrated, it amended the language of the statute, it changed the title, but it did not increase its scope. It was still confined to literature and to other visual representations. Since this matter was determined by the court below, no attempt has been made by Congress to modify or amend the statute to include such records. In view of all these facts, it appears apparent that phonograph records are not a new means of conveying an old idea, and that Congress has acted with such records in mind and has either neglected or refused to consider them sufficiently important to prevent their shipment in interstate commerce.

Why Congress has failed to proscribe phonograph records which carry dirty songs and stories is a matter of mere conjecture. Perhaps, it has determined that they are no better nor worse than dirty jokes, not the sort of thing one tells in the best of company, but, nevertheless, not evil enough to corrupt the morals of their listeners. Perhaps, it may be because it believed that auditory obscenity is transitory and fleeting and not susceptible of immoral purposes as are pictures or books, which may be carried about on the person or hidden and later brought forth to dwell upon at length and in secret.[7] It may be that Congress merely has neglected to consider such records. Whatever the reason, however, it is clear that Congress has not proscribed their shipment in interstate commerce at the present time.

The purpose of criminal statutes primarily is not to punish the wrongdoer. The prime purpose of a criminal statute is to prevent the performance of acts which the lawmakers deem harmful to society. Citizens and subjects are not consulted and have no direct voice in choosing the phraseology of a statute. Under such circumstances, it is far better to insist that the statute be made clear and the

[7] While it is true that Congress has banned obscene language over the radio, it may have considered this an entirely different evil, in view of the fact that a radio broadcast reaches a vast, unsuspecting audience.

luty of the citizen unmistakable, than it is to punish an ndividual and in so doing to extend the operation of statute beyond its clear scope without warning. For all practical purposes, the government has stopped the interstate traffic n this type of phonograph record. Having accomplished his administrative purpose, it should have amended he statute, and relieved the situation of doubt. Considered in his light it is difficult to ascertain the position of the gov- rnment. On the one hand it has insisted that the danger s great, and on the other it has taken no steps to assure the prevention of this evil in the event the opinion rendered by he court below over one half year ago is affirmed. If the hipment in interstate commerce of obscene phonograph records is harmful to society, the well being of and the duty o the citizen would have required and does require that such an amendment be made.

Conclusion

For the foregoing reasons it is respectfully submitted hat the judgment of the court below should be affirmed.

A. J. Zirpoli,
Attorney for Respondent.

Haskell Titchell,
Of Counsel.

APPENDIX

CONGRESSIONAL RECORD
66th CONGRESS
2nd SESSION

January 6-28, 1920

59

Pages 1081-2180

Page #2170—House of Representatives:

Mr. Walsh: "Mr. Speaker, the only amendment to the penal law which this bill makes is to insert the words "Motion-picture film" in section 245. Section 245 places a penalty upon persons who bring or cause to be brought into the United States, and so forth, or deposit or cause to be deposited with an express company for transportation *certain inhibited objects* . . . and this *includes within that classification* motion-picture film . . ."

CONGRESSIONAL RECORD
66th CONGRESS
2nd SESSION

May 4-24, 1920

59

Part 7

Pages 6485-7556

Page #7297: House of Representatives:

Mr. Walsh: "Mr. Speaker, this bill passed the House several weeks ago. It amends the penal code by simply *including obscene* motion-picture films among the *articles that are not permitted* to be transported in interstate commerce. . . ."

CONGRESSIONAL RECORD
66th CONGRESS
2nd SESSION

59

Page #8334: June 3, 1920—Senate:

Senator Nelson: ". . . to amend the law in reference to lascivious pictures, and so forth, *so as to include theatres and motion-picture shows* . . ."

The House Report on this amendment is as follows:—

HOUSE OF
REPRESENTATIVES

66th CONGRESS — REPORT
2nd SESSION — No. 580

Mr. Walsh, from the Committee on the Judiciary, submitted the following report:

"The Committee on the Judiciary, to whom was referred H. R. 7629, a bill to amend the penal laws of the United States, report the bill favorably with the recommendation that the bill do pass.

The only change in section 245 of the penal laws is by adding the words 'motion-picture film' *to the list of articles which are prohibited from carriage* by common carrier from . . ."

The Senate Report on this Amendment is as follows:

CALENDAR NO. 480
SENATE

66th CONGRESS — REPORT
2nd SESSION — No. 528

Mr. King, from the Committee on the Judiciary, submitted the following report:

". . . that the only change which they intended to make in the present law is to *add* the words 'motion-picture film' *to the list of articles that are prohibited from carriage* . . ."